BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

There was no opinion rendered by the District Court of the United States for the Eastern District of Texas. Its finding of fact and conclusions of law will be found in the record at page 30 ff. The opinion of the United States Circuit Court of Appeals for the 5th Circuit was rendered on May 21, 1943 and has not yet been officially reported, but will be found in the record at page 205 ff. A rehearing was refused on July 1, 1943.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, ch. 229, section 1, 43 Stat. 938, 28 U.S.C. 347(a).

III.

STATEMENT OF THE CASE.

This has been fully covered in the petition filed herein for certiorari, and in the interest of brevity is not repeated at this point. (See Ante, page 2).

IV.

SPECIFICATION OF ERRORS.

First.

The Court of Appeals erred in holding that the Diesel Tug DORIS DEAN was at fault for proceeding down her own port bank of the Calcasieu River in violation of Article 25 of the Inland Waters Rules, which is the Act of Congress of the United States of June 7, 1897, c. 4, Section 1, 30 Stat. 101, 33 U. S. C. 210. This Act is not applicable to the Calcasieu River, navigation thereof being governed by Section 4233 of the Revised Statutes of the United States, as amended, and by the rules and regulations supplementing the statutory rules adopted by the Board of Supervising Inspectors of the United States pursuant to Section 4412 of the Revised Statutes of the United States. The Calcasieu River is one of those rivers which flow into the Gulf of Mexico, all of such rivers being expressly excepted from the purview of the Inland Waters Rules. (Argument, post page 13).

Second.

The Court of Appeals erred in holding in effect that Rule 25 of the Inland Waters Rules, even if applicable, applied to a collision between a vessel under way and a moored vessel. (Argument, post page 17).

Third.

The Court of Appeals erred in holding in effect that Rule 25 of Inland Waters Rules, even if applicable, applied to a shallow draft vessel such as the DORIS DEAN. (Argument, post page 17).

Fourth.

The Court of Appeals erred in holding that the fact that the DORIS DEAN kept to her own left hand side of the channel was a fault *per se*, because the presence of the DORIS DEAN on her own left hand side of the channel was a condition, not a cause, of the collision with the BUTTE, and therefore the conduct of the DORIS DEAN in proceeding on the left hand side of the channel should be excused. (Argument, post page 18).

Fifth.

The Court of Appeals erred in failing to hold that the failure of the barge BUTTE to display a light was a statutory fault which caused the collision and rendered the barge BUTTE solely liable therefor, or, in the alternative, contributed to the collision, rendering the BUTTE equally liable therefor with the DORIS DEAN, and in the latter event dividing the damages between the two vessels. (Argument, post page 19).

ARGUMENT.

First Assignment of Error.

(Ante, page 12)

The Court of Appeals found that the DORIS DEAN was at fault for proceeding down her own left hand side of the Calcasieu River, apparently on the mistaken assumption that some rule of navigation, either statutory or promulgated by the Board of Supervising Inspectors, forbade such action. The Court appears to have been of the mistaken opinion that Rule 25 of what is commonly known as Inland Waters Rules, being a navigation rule

established by the Act of Congress of the United States of June 7, 1897 c. 4, Section 1, 30 Stat. 101, 33 U.S.C. 210, was applicable, because it cited in support of its holding the case of *The Standella*, 108 F. (2d) 619, previously decided by that Court, which interpreted and applied that rule. However, it is clear that that Act of Congress is by its terms inapplicable to the Calcasieu River. The preamble to that Act provides :

> "Whereas the provisions of chapter eight hundred and two of the laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea, apply to all waters of the United States connected with the high seas navigable by seagoing vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and
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> Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, *except* the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and *rivers emptying into the Gulf of Mexico and their tributaries*, shall be stated in one Act: Therefore,
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> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, *except* the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North, and *rivers emptying into the Gulf of Mexico and their tributaries*, and are hereby declared special rules duly made by local authority:" (Italics ours).

It is apparent, therefore, that it was never intended to make this Act of Congress applicable to rivers flowing into the Gulf of Mexico and their tributaries.

Section 5 of the Act, which is the repealing clause, reads:

> "*Sec. 5.* That *sections forty-two hundred and thirty-three and forty-four hundred and twelve (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating* the Red River of the North and *rivers emptying into the Gulf of Mexico and their tributaries,* and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), and forty-four hundred and thirteen of the Revised Statutes of the United States, and chapter two hundred and two of the laws of eighteen hundred and ninety-three, and sections one and three of chapter one hundred and two of the laws of eighteen hundred and ninety-five, and sections five, twelve, and thirteen of the Act approved March third, eighteen hundred and ninety-seven, entitled 'An Act to amend the laws relating to navigation', and all amendments thereto, are hereby repealed so far as the harbors, rivers, and inland waters aforesaid *(except* the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and *rivers emptying into the Gulf of Mexico, and their tributaries)* are concerned." (Italics ours).

The effect of this repealing clause was to leave in full force and effect, as applying to rivers flowing into the Gulf of Mexico and their tributaries, Section 4233 of the Revised Statutes of the United States, as amended, and the navigation rules contained therein, and also the navigation rules of the Board of Supervising Inspectors amplify-

ing the navigation rules found in Section 4233 of the Revised Statutes, these rules having been made pursuant to the provisions of Article 4412 of the Revised Statutes of the United States.

There is no navigation rule in Section 4233 of the Revised Statutes of the United States comparable to Rule 25 of the Inland Waters Rules. The nearest approach thereto is found in Rule III. of the rules and regulations made by the Board of Supervising Inspectors as required by Section 4412 of the Revised Statutes, amplifying the navigation rules set forth in Section 4233 of the Revised Statutes of the United States, as amended, which reads:

> "RULE III. When two steamers are about to enter a NARROW CHANNEL at the same time, the ascending steamer shall be stopped below such channel until the descending steamer shall have passed through it; but should two steamers unavoidably meet in such channel, then it shall be the duty of the pilot of the ascending steamer to make the proper signals, and when answered, the ascending steamer shall lie as close as possible to the side of the channel the exchange of signals may have determined, as provided by Rule I, and either stop the engines or move them so as only to give the boat steerageway, and the pilot of the descending steamer shall cause his steamer to be worked slowly until he has passed the ascending steamer."

Rule III., by its specific terms, applies to an ascending and a descending vessel: that is, to two vessels under way, and is a rule of the road which has no application to a moored vessel and cannot therefore, be applied to the collision between the DORIS DEAN and the BUTTE.

So far as the rules governing the navigation of the Calcasieu River are concerned, a vessel may run on her right bank or on her left bank or in any other part of that river, provided only that when passing another vessel under way she shall pass the other vessel port to port, as provided by Rule I. of the applicable pilot rules.

We submit, therefore, that the major premise supporting the Court of Appeals' decision in this matter is based on a misapplication of Rule 25 of the pilot rules pertaining to Inland Waters, which does not apply, and that therefore the opinion and decree are incorrect.

Second Assignment of Error.

(Ante, page 12)

Even if Rule 25 of the Inland Waters Rules or some similar rule were applicable to the Calcasieu River, such a rule would not be applicable to the collision between the DORIS DEAN and her tow and the barge BUTTE because these rules are rules of the road, dealing with the passage of vessels, have been so construed, and have been construed as not applying to a collision between a moored vessel and a vessel under way. As between such vessels, the vessel under way has the right of way in every part of the river. *The Belfast*, 226 Fed. 362.

Third Assignment of Error.

Ante, page 12)

Again, even if Rule 25 of the Inland Waters Rules or some similar rule were applicable to the Calcasieu River, such a rule would not be applicable to the collision between

the DORIS DEAN and her tow and the barge BUTTE because such rules apply only to deep draft vessels which are compelled to traverse the usually narrow dredged steamship channels of inland waterways and do not apply and have been construed as not applying to shallow draft vessels which can, with safety, navigate outside of such narrow dredged channels and in any part of the waterways. *The Mary S. Lewis*, 126 Fed. 848.

Fourth Assignment of Error.

Ante, page 12)

Even if there were any rule of navigation which required the DORIS DEAN to proceed on her right hand side of the river, the mere fact that the DORIS DEAN proceeded on the left hand side of the channel was not a fault *per se*, and the Court of Appeals erred in so holding. On numerous occasions the Courts of Appeals in the various circuits have had occasion to consider a similar situation and they have held, particularly in construing Article 25 of the Inland Waters Rules, that proceeding on the left hand side of the channel was merely a condition of a collision with a vessel and not the cause. Two of the most recent decisions are those of the Circuit Court of Appeals for the First Circuit in *Merchants' & Miners' Transportation Company v. Nova Scotia SS. Company*, 40 F. (2d) 167, and of the Circuit Court of Appeals for the Second Circuit in *The Deutschland*, 90 F. (2d) 454. The decision of the United States Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions in the First and Second Circuits and Your Honors should grant a writ of certiorari to correct and to eliminate such conflict. (See also, post page 24).

Fifth Assignment of Error.

Ante, page 12)

Both the District Court in its findings of fact and the Court of Appeals in its opinion found that the barge BUTTE was unlighted, and this factual finding is not contested by the proctors for the barge BUTTE. One of the gravest errors of which we complain is the failure of the Court of Appeals to consider this phase of the matter and to hold that this omission was a statutory fault which either caused the collision and rendered the BUTTE solely liable therefor, or, at the very least, contributed to the collision, rendering the BUTTE equally at fault with the DORIS DEAN and requiring division of damages between the two vessels.

Rule 12 of Section 4233 of the Revised Statutes of the United States; Act of February 19, 1895, c. 102, 28 Stat. 672, 33 U. S. C. 321, provides:

> "Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water craft navigating any bay, harbor, or river, by hand power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels."

The Board of Supervising Inspectors, amplifying this rule pursuant to provisions of Article 4412 of the Revised Statutes of the United States, provided that the light should be displayed on the vessel "forward, not less than eight feeet above the surface of the water" .

Obviously the BUTTE was tied up either in or near the navigable channel of the Calcasieu River and it should not require any citation of authority to demonstrate that it was necessary that that vessel display a white light in the manner required by the cited statute and rule, and that her failure to do so was a statutory fault. However, there is ample authority so holding, and the United States Circuit Court of Appeals for the Fifth Circuit itself has so held in a similar case applying the same rule. *The St. John*, 54 F. 1015. In that case the facts were that the steamer St. John, travelling up Bayou Lafourche on a dark, hazy and drizzly night, collided with a partly loaded coal barge tied up to the bank of the Bayou, projecting some forty feet into the channel. The bayou at that point was 200′ in width. The Court observed that since this was a collision between a stationary vessel and a steamboat under way, there was a presumption of fault on the part of the moving vessel that might be overcome by direct and positive proof; that the location of the barge was such that it was required to carry a light as required by Rule 12 of Section 4233 of the Revised Statutes and the rule adopted by the Board of Supervising Inspectors; that while the rule is imperative that a steamer should keep out of the way of a vessel at anchor, it is nevertheless imperative that a vessel at anchor should display a light, and if she fails in this and a collision occurs, she must bear the loss, unles it appears that with due care she could have been seen and avoided; that in the absence of a light the burden of proof is upon the stationary vessel to excuse her conduct; that the St. John was not proceeding at an unreasonable speed and that she was not at fault; and in concluding and holding the vessel under way not at fault and

the moored barge solely at fault for failure to display a light, the Court said:

> "Is the fact that the barge was not seen before, notwithstanding the absence of a light, presumptive evidence of negligence on the part of the officers or crew of the steamer? The night was dark, hazy and drizzly. It had been raining. The barge or coal boat was but about 2 feet above the surface of the water, with no masts, spars, sails, or upper work, or anything light in color which would be easily visible in the dark, and we cannot consider that the fact that it was not seen until it was within a distance of 175 or 180 feet would show lack of care or diligence. It is testified to that the lookout and pilot were attending to their duties, and they had the right to assume that any vessel or boat in the stream would make itself known by a light. The Scotia, 14 Wall. 181. They were naturally and properly on lookout for lights, and not low, black objects on the surface of the water; and it does not appear that they could with due diligence have discovered it before they did.
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> "It appears that every precaution to avert the disaster was taken as soon as the discovery was made. * * * We fail to find any fault in the steamer on account of unreasonable speed or lack of lookout, *and consider the absence of a light was the entire cause of the disaster.*" (Italics ours).

In *The Alabama*, 26 F. 866, it appeared that a derrick-boat moored to a bridge pier in the Alabama River, the location of which was out of midchannel and out of the course usually pursued by passing steamers and which was showing no light, as required by Rule 12, was collided

with by the Steamer Alabama under way. The Court held the moored derrick barge solely at fault, saying:

> "That the derrick-boat was moored at a point distant from the channel of the river, meaning the point where the main current of the water passed, is correct; but that the channel of the main current of the water in a river is to be held to be the channel of a river, in the sense of the admiralty, cannot be maintained. Skilled navigators of rivers, especially in high water, do not always follow the main current of the water around bends in the river, but run the 'points', I believe it is called, and so shorten distance and avoid currents. * * * Now, to say that, under such circumstances, a boat of the kind this derrick-boat was, might be moored in the river where those in charge of her might deem that a steam-boat would have no occasion to go, and therefore not be required to expose lights, is a proposition which I think cannot be maintained. I find the fact to be that the derrick-boat was moored where she should have had lights exposed as required by the statute, and, under such finding, the law is—that where there has been a breach of the statutory regulation as to lights exhibited by a vessel, she is prima facie in the wrong, and the burden of proof is on her to show that the want of lights did not contribute to the collision."

In *The Oliver*, 22 F. 848, a small schooner anchored in twelve feet of water and lying 125 feet inside the channel in the Potomac River and displaying no lights, was run into and sunk at midnight by another schooner sailing as close to shore as practicable. There was a haze on the surface of the water at the time of the collision, and although the schooner under way was maintaining a lookout, the schooner at anchor was not discovered until the

moment of the collision. In holding in favor of the vessel under way, the court in the course of its opinion had this to say:

> "Capt. King, the master of the Mechanic, was familiar with the waters of the Potomac in the region of Maryland Point and Nanjemoy creek, and should have been familiar with the habit of the smaller class of sail-vessels, in coming down the Potomac under a stiff breeze from the Maryland shore, to run in tolerably close to shore. In anchoring his schooner in the course apt to be taken by such vessels, he took the risk of whatever might happen there through his fault. * * * In anchoring in the probable course of such vessels, he took all the risks of accidents which might happen through his fault; for an admiralty court would not dare to set such a precedent as to hold that if he had no anchor light up at such a place as the one described, he might recover damages for a collision. That would be setting a premium on acts inviting collisions. * * * But the law of navigation which requires vessels lying at anchor in a fairway to have a light up is imperative. It must be obeyed. It must be effectively obeyed. * * * Lying, as she was, in a fairway without a light, and presenting, as she lay, low down in the water, at midnight, but a small object to the vision of a vessel approaching her from her rear, she invited collision with no light up. The usual presumption of law, against the moving vessel, in favor of the one at anchor, is therefore reversed in this case, and the Mechanic must be held to have been in fault; for, to hold that a vessel lying where she was, without a light in the rigging or a watch on deck, was not in fault, would be to offer a premium for collision."

Not only are the cited cases authority for the necessity of the BUTTE'S showing a white light in compliance

with the applicable pilot rules, but they are authority also for our contention that the cause of the collision was the failure of the barge BUTTE to show a light and that the fact that the DORIS DEAN was travelling on the left hand side of the channel was simply a condition and not the cause of the collision. The DORIS DEAN and her tow could have been stopped in 160 feet (R. 94). Her navigator testified that he had seen, when he was a quarter of a mile off (R. 122), a light on the oil terminal just ahead of where the BUTTE was moored, and not only is there a presumption that if the BUTTE had complied with the statutory obligation to display a light, the DORIS DEAN'S navigator or lookout would have seen it when that vessel was a quarter of a mile off, but there is also the direct testimony in the record of the navigator Doty and the lookout Comeaux that if the BUTTE had displayed a proper light they could have seen her in time to avoid the collision (R. 166, 193-194), and that after they did see her, though everything was done to avoid the collision, it was then unavoidable (R. 124, 129, 141, 166-179).

Even if the DORIS DEAN was navigating on the wrong side of the channel, which we emphatically deny because it was proper for her to run anywhere in the Calcasieu River, nevertheless that was simply a condition and not the cause of the collision and is no ground for holding the DORIS DEAN at fault. See also *The Deutschland*, 90 F. (2d) 454, and *Merchants' & Miners' Transportation Company v. Nova Scotia SS. Company*, 40 F. (2d) 167.

We therefore submit that the barge BUTTE was solely at fault for this collision and the Court of Appeals should have so held, but even if there was fault on the part of the DORIS DEAN, which we emphatically deny and which we assume only for the purpose of this discussion and without any concession in that regard, it seems indisputable that the barge BUTTE was also at fault for failure to display a light, and that at the very least both vessels should be held at fault for this collision and the damages divided between them.

As we have pointed out in our application for writ of certiorari (ante, page 7), the Court of Appeals has erred grievously in failing to follow the rule established by the Supreme Court of the United States in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, reannounced and reapplied repeatedly, that where a vessel is guilty of a statutory fault, in order to exonerate herself from liability, she carries the burden of showing that such fault not only *did not* cause or contribute to the collision, but that it *could not* have done so; by failing to even consider the failure of the BUTTE to display a light and in failing to hold that that omission at least contributed to the collision; and in departing from its own jurisprudence on the subject, exemplified by *Johnson v. United States*, 4 F. (2d) 102, and perpetuating the error it had committed in *The Standella*, 108 F. (2d) 619. In the interest of brevity we do not reiterate here what we said in our petition for certiorari, but only cite here additional authority.

In *The Chester O. Swain*, 76 F. (2d) 890, decided by the United States Circuit Court of Appeals for the Second Circuit, there was involved a collision in the Mississippi River at New Orleans wherein the Scantic, an anchored vessel violating the statutory rules regarding displaying lights, though she was displaying lights not in compliance with the rules, was collided with by the tanker Chester O. Swain bound down the river. The court found the Chester O. Swain at fault for negligent navigation, but likewise found the Scantic at fault for failure to strictly comply with the statutory rules for the display of lights, saying that she had the burden of showing that her lights "were not confusing to the Swain, and did not contribute to the collision, and that the accident would have still occurred if her lighting had conformed to law".

At the very least this is the rule that should have been applied by the Court of Appeals. There is absolutely no justification for the failure of that Court to consider the barge BUTTE'S fault and its failure to hold that the BUTTE was at least equally at fault with the DORIS DEAN.

Nor can it be said in justification of the opinion of the Court of Appeals that the DORIS DEAN'S fault was gross and the BUTTE'S fault minor, so that the Court would be justified in overlooking the latter. The applicable rule in this regard is well stated by the United States Circuit Court of Appeals for the First Circuit in the comparatively recent case of *General Seafoods Corpora-*

tion v. J. S. Packard Dredging Company, 120 F. (2d) 117. There the Court said:

> "It is well settled law that 'where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.' Alexandre v. Machan (The City of New York), 1893, 147 U. S. 72, 85, 13 S. Ct. 211, 216, 37 L. Ed. 84, 85. Accord, The Victory (The Plymothian), 1897, 168 U. S. 410, 423, 18 S. Ct. 149, 42 L. Ed. 519; The Ludwig Holberg, 1895, 157 U. S. 60, 15 S. Ct. 477, 39 L. Ed. 620; The San Simeon, 2 Cir., 1933, 63 F. 2d. 798. *However, this court long ago said that this rule that where one vessel was guilty of gross fault, the other is presumed not to have been in fault, was artificial and misleading unless very carefully applied.* The Admiral Schley, 1 Cir., 1904, 131 F. 433, 439, affirmed on rehearing, 1 Cir., 1905, 142 F. 64, certiorari denied, sub. nom. Consolidation Coal Co. v. American Mail Steamship Co., 1906, 201 U. S. 648, 26 S. Ct. 762, 50 L. Ed. 905. *Even though the first vessel is grossly at fault, a plain fault on the part of the other vessel is not excused.* The Albert Dumois, 1900, 177 U. S. 240, 253, 20 S. Ct. 595, 44 L. Ed. 751; The Yamashita Kisen Kabushiki Kaisha v. McCormick Inter. S. S. Co., 9 Cir., 1927, 20 F. 2d. 25; The San Simeon, supra. It thus becomes necessary to determine whether the Trim was guilty of a plain fault." (Italics ours).

The court then went on to examine the fault of the Trim, found that vessel guilty of a plain fault, held her equally

at fault with the other vessel, condemned them both and divided the damages.

CONCLUSION.

In conclusion, we submit that the opinion of the Court of Appeals in this case is erroneous, being based as it is on that Court's opinion in *The Standella*, which was itself erroneous; that the decision of the Court of Appeals in this case evidences the intention of the Court of Appeals to perpetuate its error in *The Standella* case and to continue that error in the jurisprudence of the Fifth Circuit, which will result in the jurisprudence of the Fifth Circuit conflicting with the jurisprudence of the other Circuit Courts dealing with admiralty matters; and that to prevent the perpetuation of the manifest errors which have been committed by the United States Circuit Court of Appeals for the Fifth Circuit and to prevent its jurisprudence in admiralty matters from being in conflict with that in other Circuits so as to preserve the uniformity of the admiralty jurisprudence, Your Honors should grant a writ of certiorari to the end that the decision of the Court of Appeals in this case may be reviewed and the errors corrected.

Respectfully submitted,

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GEORGE W. BROWN, JR.,
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August, 1943.